

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 631 OF 2020

**In the Matter of an Application pursuant to Section 3(d) and 20 of the Belize
Constitution**

And

**In the matter of an Application pursuant to section 26 of the Public Roads Act,
Chapter 232 and Section 29 of the Belize City Council Act, Chap 85**

And/Or

IN THE MATTER of a claim in nuisance

BETWEEN

ETHEL E THOMPSON

CLAIMANT

AND

KENYON FLOWERS

1ST DEFENDANT

TIFFANY CADLE

2ND DEFENDANT

BELIZE CITY COUNCIL

3RD DEFENDANT

Before the Honourable Mr. Justice Westmin R.A. James (Ag)

Date of delivery: 22nd February 2021

Appearances: Mr. Allister Jenkins Attorney-at-Law for the Claimant

Mr. Andrew Bennett Attorney-at-Law for the 1st Defendant

Mr David Morales Attorney-at-Law for the 2nd Defendant

Mr. William Lindo Attorney-at-Law for the 3rd Defendant

DECISION ON STRIKE OUT APPLICATION

1. By a Fixed Date Claim Form for Constitutional and Declaratory Relief dated the 19th day of October, 2020 and supported by an Affidavit sworn on even date the Claimant/Respondent sought the following reliefs from the Applicant/Defendants

1. A declaration that the 1st and 2nd Defendants' activities (erection of wooden structure and fixture as well as the conduct of its restaurant business) being done pursuant to an unlawful license issued by the 3rd Defendant, is in breach of her fundamental right not to be arbitrarily deprived of the use and enjoyment of Parcel 259;
 2. A declaration that the 3rd Defendant has no lawful authority to permit the 1st and 2nd Defendants to (a) erect a wooden structure and fixtures and (b) operate a restaurant business 'Gwen's Kitchen #2') on that portion of the road reserve on Coney Drive that abuts parcel 259, under the Public Roads Act, the Belize City Council Act or any law;
 3. A mandatory injunction against the 1st and 2nd Defendants forthwith that they remove or cause to be removed the wooden structure and all fixtures, furniture and appliances placed on the road reserve along Coney Drive, which abuts parcel 259 and upon which they operate "Gwen's Kitchen #2";
 4. An order restraining the 3rd Defendant from issuing any permits to the 1st and 2nd Defendants or any third party to erect any structure other than permitted under section 26 of the Public Roads Act and section 29 of the Belize City Council Act and/or to issue any permit/licence to the 1st and 2nd Defendant or any third party to operate a restaurant or any business at all alongside the road reserve on Coney Drive that abuts Parcel 259;
 5. Damages;
 6. Interest on any amount found to be owing by way of damages, pursuant to section 166 and 167 of the Supreme Court of Judicature Act, Chapter 90 of the Laws of Belize or equitable interest; and
 7. Costs
2. The 3rd Defendant applied to the Court pursuant to Rule 26.3(1)(b) and (c), Rule 26.1(2)(c), Rule 1.1 of the Supreme Court (Civil Procedure) Rules 2005 and the inherent jurisdiction of the Court for the following orders
1. An Order that the Claimant/Respondent's claim against the Applicant be struck out
 2. That judgment be entered in favour of the Applicant in respect of the Claimant/Respondent's claim against it;
 3. Alternatively, that the period for filing a Defence herein be extended by twenty-one days from the date on which the Court determines this Application;
 4. Costs; and
 5. Such further and/or other relief as the Court sees fit

3. The grounds of the application include
 1. The Claimant/Respondent's claim against the 3rd Defendant/Applicant is an abuse of process of the Court in that:
 - a. The Claimant/Respondent has brought the instant claim by way of Constitutional Relief notwithstanding the fact that there has been no contravention of her fundamental rights or freedoms;
 - b. The Respondent has failed to exhaust her alternative remedies by way of
 - i. Judicial review of the decision dated the 19th July, 2016 to let a portion of the road reserve along Coney Drive to a third party;
 - ii. Judicial Review and/or appeal of the Belize City Trade Licence Board's decision to issue a Trade Licence to *Gwen's Kitchen #2* pursuant to Part 56 of Part 60 of the Supreme Court
 - iii. The Regime as provided for under the Nuisances Act, Chapter 118 of the substantive laws of Belize
 - c. That has been unreasonable delay by the Applicant in bringing the instant claim;
 - d. The Applicant's claim is, on a proper construction of the coercive orders sought, one for Judicial Review albeit clothed as one of declaratory and constitutional relief designed to circumvent the strictures of the application stage of Judicial Review.
 2. The Respondent's claim against the Applicant discloses no reasonable grounds for bringing the claim as the Respondent, living on Parcel 260, Block 16, Caribbean Shores/Belize Registration Section, is devoid of any locus to found a claim in nuisance;
 3. The Respondent's claim for purported arbitrary deprivation of property, vis a vis, an easement along the length of Coney Drive which Parcel 259 abuts that thoroughfare, is wholly misconceived and discloses no reasonable ground for bringing this claim as the Respondent is devoid of any easement save an except the gate situated thereon.

Whether the fixed date claim and affidavit of the Claimant/Respondent discloses no grounds for bringing or defending the claim.

1. Part 26.3 (1)(c) of the CPR provide as follows;

26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

2. As stated by this Court and previously stated numerous courts this is considered a nuclear option and the rule ought not to be used except in the clearest of cases.¹ Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate and so the burden of proof in this regard is on the Applicant.² The Defendants, as Applicants, must satisfy the Court that no further investigation will assist it in its task of arriving at the correct outcome.
3. The Claimant/Respondent seeks a declaration that her fundamental right not to be arbitrarily deprived of the use and enjoyment of Parcel 259 was being breached by the 1st and 2nd Defendants' activities (erection of wooden structure and fixture as well as the conduct of its restaurant business) being done pursuant to an unlawful license issued by the 3rd Defendant.
4. A claim for the breach of a fundamental right and freedoms protected by the constitution requires state action and is not an action as between one individual and another. In *Maharaj (No. 2)*, Lord Diplock postulated that the protection afforded in the redress clause of the Constitution was against contravention of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers. In *Thornhill v AG [1980] 2 WLR 510* Lord Diplock reaffirmed his observation expressed in Maharaj's case when he said at p 516:- "*the protection afforded to the individual by these sections was against contraventions of those rights and freedoms "by the state or by some other public authority endowed by law with coercive powers" and not by another private individual Chapter I of the constitution does not deal with purely private wrongs.*"
5. This test has been embraced by and applied consistently in Belize: see *Alonzo v Development Finance Corporation 1 BZLR 82*, *Wade v Roaches* and *Fort Street Tourism Village v A-G of Belize and others* (2008) 74 WIR 133
6. Therefore, a declaration against the 1st and 2nd Defendant private individuals without coercive powers of the state that their actions was in breach of her fundamental right not to be arbitrarily deprived of the use and enjoyment of Parcel 259 has no legal basis. Therefore, there is no reasonable ground for a constitutional claim against the 1st and 2nd Defendants who are private individuals.

¹ *Brian Ali v. The Attorney General of Trinidad and Tobago*, CV 2014 02843 Kokaram J at para 13

² *Tawney Assets Limited v East Pine Management Limited and Ors* [2012] ECSC J0917-4

7. In relation to the 3rd Defendant, the constitutional relief sought does not seem to be against the 3rd Defendant. The reliefs claimed against the 3rd Defendant taken at its highest is that in granting the lease to the 1st and 2nd Defendant the 3rd Defendant breached the Claimant/Respondent's fundamental right not to be deprived of the use and enjoyment of Parcel 259.
8. The Claimant/Respondent currently has three rights of ingress and egress from Parcel 259 and 260 two on the Highway and one on Coney Drive. None of those are being taken away from the Claimant/Respondent by the 3rd Defendant/Applicant nor is she being deprived of same and so there can be no reasonable cause of action there. The Claimant/Respondent also does not own the Road Reserve and any development of the Road Reserve which abuts the Claimant/Respondent's property is not in itself a deprivation of the property as the Claimant/Respondent still has full use of her property.

Whether there was an alternative remedy available to the Claimant/Respondent at the time she chose to proceed by way of Administrative Claim pursuant to the Constitution having regard to the true nature and substance of his claim

9. The Defendant also submitted that this claim should be struck out as an abuse of process since the Claimant/Respondent had a parallel remedy available to her
10. CPR Part 26.3 (1) (b) states:

In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

11. It is well established that the right to apply to the Supreme Court pursuant to section 20 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy.³ In *Jaroo*, the Privy Council reverberated its salutary warning that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy. *Harrikissoon* concerned the case of a teacher who was transferred from one school to another and

³*Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago* [Privy Council No. 54 of 2000]; *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265; *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106 at pp. 111-112 and *Hinds v The Attorney General* [2001] UKPC 56.

sought redress under the Constitution. The Privy Council was resolute in stating that constitutional redress could not be used as a substitute for judicial control of administrative action.

12. The Court is aware however, that the mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings. The crux is their adequacy. As stated by Sharma CJ in *Belfonte v A-G*⁴ and relied on in *Lucas (supra)* at [138] “the determining factor in deciding whether there has been an abuse of process is not merely the existence of a parallel remedy, but also the assessment that the allegations grounding constitutional relief are being brought ‘for the sole purpose of avoiding the normal judicial remedy for unlawful administrative action’.
13. The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. If there is an adequate parallel remedy, constitutional relief is only appropriate where some additional “feature” presents itself. This includes, without being exhaustive, arbitrary use of state power⁵ or where there are breaches of multiple rights.⁶
14. The Claimant/Respondent says that she was arbitrarily deprived of her right to ingress and egress Parcel 259 from and unto Coney Drive where the road/street and its reserve abuts the said property, and the use and enjoyment of her property by the actions of the 3rd Defendant in permitting and granting the 4th Defendant a lease of the road reserve which abuts Parcel 259. The Claimant/Respondent also alleges that the 3rd Defendant has also permitted several other kiosks to be placed on the entire span of the road reserve that abuts Parcel 259, which now restricts the Claimant/Respondent’s ability to develop a significant portion of Parcel 259 in the future.
15. The Claimant/Respondent’s case and evidence is that she is entitled to an easement over the entire Road Reserve for the purpose of accessing Parcel 259 and so entitled when she develops the land in the future consistent with that right of way. The Claimant/Respondent has not indicated the method of acquiring the easement in her pleadings but a claim for interference with an easement may be pursued whether the easement was created by grant, arose by implication of law, or is claimed under the doctrine of prescription.

⁴ (2005) 68 WIR 413 at [18]

⁵ *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 2005; *Takitota v AG* [2009] UKPC 12

⁶ *Belfonte v Attorney General* [1968] W.I.R. 416 (CA TT)

16. A person entitled to sue in respect of a claim for an easement and an interference with an easement, the relief granted may include a declaration of the right, damages and/or an injunction to restrain the continuance or repetition of the obstruction.
17. There is therefore a fully adequate and alternative private law action available to the Claimant/Respondent. Therein the Claimant/Respondent can establish an easement over the Road Reserve if there is one and that the leases and construction as alleged interfere with that right. There is therefore no need for a constitutional claim and no special feature of this case is present that would justify a constitutional claim. Therefore, the Court holds that the originating motion will be an abuse of process in these circumstances.
18. The Claimant/Respondent also claims declaratory reliefs against the 3rd Defendant. The Claimant/Respondent's claim in this regard is
 - a. A declaration that the 3rd Defendant has no lawful authority to permit the 1st and 2nd Defendants to (a) erect a wooden structure and fixtures and (b) operate a restaurant business 'Gwen's Kitchen #2') on that portion of the road reserve on Coney Drive that abuts parcel 259, under the Public Roads Act, the Belize City Council Act or any law;
 - b. An order restraining the 3rd Defendant from issuing any permits to the 1st and 2nd Defendants or any third party to erect any structure other than permitted under section 26 of the Public Roads Act and section 29 of the Belize City Council Act and/or to issue any permit/licence to the 1st and 2nd Defendant or any third party to operate a restaurant or any business at all alongside the road reserve on Coney Drive that abuts Parcel 259;
19. When scrutinising the substance of an application for a declaration in this regard you have to look behind the form of the relief expressly sought in order to ascertain the type of claim being pursued. Of central importance to this evaluation is whether the relief sought is in the form of any of the orders listed for judicial review is sought.⁷ The remedy sought by the Claimant/Respondent in this case especially the injunction, goes way beyond declaratory relief and seems to be pursuing reliefs of a type listed in CPR 56.1(3) or akin to it. Therefore, this case is not a proper claim for declaratory relief.

⁷ *Attorney General and another v Isaac* [2018] UKPC 11

20. Further, the first declaration would be otiose in an easement claim as if the Claimant/Respondent is able to establish an easement and entitled to the right of way as alleged the 3rd Defendant would not be able to interfere with that right. This would include giving anyone permission to do anything with the right of way that would interfere with the Claimant/Respondent's right. Further, these reliefs can be a part of the claim for an easement, that is Defendant has no lawful right to grant the lease.
21. Likewise, in a claim for an easement one of the remedies includes an injunction that would prevent the 3rd Defendant or any third party from erecting any structures.
22. Likewise, in a claim for an easement one of the remedies includes an injunction that would prevent the 3rd Defendant or any third party from erecting any structures. Therefore, these declarations do not give this case any special flavour that will cause the matter to not be an appropriate remedy.

Nuisance

23. While a lot of time was dedicated in submissions to the purported nuisance caused by the operation of the business of the 1st and 2nd Defendants, and a considerable detail in the affidavit, the Claimant/Respondent sought no such relief in her claim. The Claimant/Respondent has made no claim for damages for nuisance or any consequential reliefs including an injunction to abate the nuisance of the Defendants. There is therefore no claim for nuisance currently before the Court.
24. The Court however has the general power pursuant to CPR 26.9 to rectify matters where there has been a procedural error. In **Real Time Systems Ltd v Renraw Investments Ltd** [2014] UKPC 6, the Privy Council stated that:

17. In that connection, the court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. As the editors of The Caribbean Civil Court Practice (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the Claimant/Respondent to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate

to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.

25. Having regard to all the circumstances of this case, the reasons outlined above and the Privy Council's decision in **Real Time Investments** and the requirement of the Claimant/Respondent to give statutory notice of any claim against a public authority in private law. I will make the following orders:

- a. The Claimants' claim is hereby struck out in its entirety without prejudice; and
- b. The Claimant is granted leave to re-file her claim in private law within 60 days;
- c. The claims shall thereafter proceed in accordance with the CPR.
- d. No order as to costs

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Westmin R.A. James
Justice of the Supreme Court (Ag)